

**AGREEMENT BETWEEN THE
CITY OF SAN DIEGO
AND
ALAN WIENER AND THE MEDIATION INSTITUTE
FOR CONSULTING SERVICES**

THIS Agreement is made and entered into between the City of San Diego, a municipal corporation, and *Alan Wiener and The Mediation Institute* [Consultant] for the Consultant to provide Professional Services to the City on *Mediation Feasibility Assessment and Public Participation Process Design* [Project].

Article I: Professional Services:

1.1 Scope of Services. The Consultant shall perform Professional Services as set forth in the written Scope of Services [Exhibit A] in consultation with the City in accordance with the Fee Schedule contained in Exhibit B, which are attached hereto and incorporated herein.

Article II: Duration of Agreement:

2.1 Term of Agreement. This Agreement shall be effective on the date it is executed by the last Party to sign the Agreement, and it shall be effective until completion of the Scope of Services.

2.2 Time of Essence. Time is of the essence for this Agreement.

2.3 City's Right to Terminate for Convenience. The City may, at its sole option and for its convenience, terminate all or any portion of the Professional Services agreed to pursuant to this Agreement by giving written notice of such termination to the Consultant. Such notice shall be delivered by certified mail with return receipt for delivery to the City. The termination of the Professional Services shall be effective upon receipt of the notice by the Consultant.

2.3.1 Payment of Reasonable Value. If at any state of the work the Project is abandoned or delayed indefinitely, the City may elect to terminate this Agreement. In the event the City elects to terminate, City shall pay Consultant the reasonable value of the work performed but not to exceed the amounts as scheduled in Exhibit B, Article II, Section A.

2.3.2 Suspension of Services. If unusual delays occur in complying with Project schedules, the City may suspend performance of further services by Consultant for a reasonable period of time, after which the City may require Compliance by Consultant with all terms and conditions of this Agreement. In the event of such suspension, City shall pay Consultant the reasonable value of the work performed up to the date of the suspension, but not to exceed the amounts as scheduled in Exhibit B, Article II, Section A.

2.3.3 Discharge of Obligations. Acceptance of payment by Consultant shall discharge all of City's obligations and liability for such payment under this Agreement except in the event

that the City under Article II, Section 2.3.2, rescinds the suspension and requests continued compliance by Consultant with the terms and conditions of this Agreement.

2.4 Remedies of City. In the event (a) that Consultant shall default in the performance or fulfillment of any covenant or condition herein contained on his part to be performed or fulfilled and shall fail to cure such default within ten (10) calendar days following the service on him of a written notice from the City specifying the default or defaults complained of and the date of which his rights hereunder will be terminated as hereinafter provided if such default or defaults is or are not cured, or (b) that Consultant shall file a voluntary petition in bankruptcy, or (c) that Consultant shall be adjudicated bankrupt, or (d) that Consultant shall make a general assignment for the benefit of creditors, then, and in either or any of said events, City may at its option without further notice or demand upon Consultant, immediately cancel and terminate this Agreement and terminate each, every and all of the rights of Consultant and of any and all persons claiming by or through Consultant under this Agreement, except the obligation to pay the reasonable value of services performed prior to termination. The rights and remedies of City as herein above set forth are cumulative only and shall in no way be deemed to limit any of the other provisions of this Agreement or otherwise to deny to City any right or remedy at law or in equity which City may have or assert against Consultant under any law in effect at the date hereof or which may hereafter be enacted or become effective, it being the intent hereof that the rights and remedies of City, as herein above set forth, shall supplement or be in addition to or in aid of the other provisions of this Agreement and of any right or remedy at law or in equity which City may have against said Consultant.

Article III: Compensation:

3.1 General. The City shall pay the Consultant for all Professional Services and all expenses related to performance under this Agreement, in an amount not to exceed Fourteen Thousand Dollars (\$14,000.00), as set forth in the Fee Schedule of Exhibit B. For the duration of this Agreement, the Consultant shall not be entitled to fees which exceed the Fee Schedule for services rendered pursuant to this Agreement. The Consultant shall not provide services beyond the scope of this Agreement unless those services, and compensation for those services, have been defined in an approved amendment to this Agreement. No City employee can bind the City with regard to any payment for services which exceeds the amount payable under the terms of this Agreement.

Article IV. Consultant's Obligations

4.1 Industry Standards. The Consultant agrees that the Professional Services rendered under this Agreement shall be performed in accordance with the standards customarily adhered to by an experienced and competent professional Mediator firm using the degree of care and skill ordinarily exercised by reputable professionals practicing in the same field of service in the State of California. Where approval by the City, the City Manager, or other representatives of the City is required, it is understood to be general approval only and does not relieve the Consultant of responsibility for complying with all applicable laws, codes, and good consulting practices.

4.2 Maintenance of Records. The Consultant shall maintain books, records, logs,

documents and other evidence sufficient to record all actions taken with respect to the rendering of Professional Services for the Project, throughout the performance of the Professional Services and for a period of three years following completion of the Professional Services for the Project. The Consultant further agrees to allow the City to inspect, copy, and audit such books, records, documents and other evidence at all reasonable times, except records which constitute or contain confidential or privileged communications with persons or entities other than the City. (See, e.g., California Evidence Code, section 1115, et seq.)

4.3 Insurance. The Consultant shall not begin Professional Services under this Agreement until it has obtained insurance certificates reflecting evidence of all insurance required in Section 4.3.1 however, the City reserves the right to request, and Consultant shall submit, copies of any policy upon reasonable request by the City. The Consultant shall not modify any policy or endorsement thereto which increases the City's exposure to loss for the duration of this Agreement.

4.3.1. Types of Insurance. At all times during the term of this Agreement, the Consultant shall maintain insurance coverages as follows: automobile liability with property damage limits not less than \$25,000 and personal injury limits not less than \$50,000, and Mediators Professional Liability, with limits not less than \$100,000. All deductibles on any policy shall be the responsibility of the Consultant. The policies are primary and non-contributing to any insurance that may be carried by the City.

4.4 Drug-Free Workplace. The Consultant agrees to comply with the City's Drug Free Workplace requirements set forth in Council Policy 100-17, adopted by Council Resolution No. R-277952 and incorporated into this Agreement by this reference.

4.5 Americans with Disabilities Act Statement. Consultant certifies that he/she is aware of and will comply with Council Policy 100-04, incorporated herein by this reference, relating to the federally mandated ADA.

4.6 Equal Employment Opportunity. Consultant is aware of and will comply with the City's Equal Opportunity and Outreach Program, as applicable, which is set forth in San Diego Municipal Code section 22.2701 et seq., and as hereinafter amended. Consultant shall not discriminate against any employee or applicant for employment on any basis prohibited by law. Consultant shall provide equal opportunity in all employment practices. Consultant shall ensure that its subcontractors comply with this Program. Nothing in this section shall be interpreted to hold Consultant liable for any discriminatory practice of its subcontractors.

4.7 Product Endorsement. Consultant is aware of and will comply with Council Policy 000-23 concerning Product Endorsement. Any advertisements by Consultant referring to the City of San Diego as a user of a product or service shall require the prior written approval of the City Manager.

4.8 City Employee Participation. Consultant understands and agrees that it is the policy of

the City of San Diego that this Agreement shall be unilaterally and immediately terminated by the City if the Consultant employs an individual who within the twelve months immediately preceding such employment did in his/her capacity as a City officer or employee participate in negotiations with or otherwise have an influence on the recommendation made in connection with the selection of the Consultant. This provision does not apply to members of the City Council.

4.9 Conflict of Interest. The Consultant is subject to all federal, state and local conflict of interest laws, regulations and policies applicable to public contracts and procurement practices, including but not limited to California Government Code sections 1090, et. seq. and 81000, et. seq. The City may determine that a conflict of interest code requires the Consultant to complete one or more statements of economic interest disclosing relevant financial interests. Upon City's request, Consultant shall submit the necessary documentation to the City. The City may determine that the Consultant must comply with the Park and Recreation Department's Conflict of Interest Code.

Article V: Reserved;

Article VI: Indemnification

6.1 Indemnification and Hold Harmless Agreement. With respect to any liability, including but not limited to claims asserted or costs, losses, attorney fees, or payments for injury to any person or property caused or claimed to be caused by the acts or omissions of the Consultant, or Consultant's employees, agents, and officers, directly or indirectly arising out of obligations, work or services involving the Project, except liability for Professional Services covered under Section 6.2, the Consultant agrees to defend, indemnify, protect, and hold harmless the City, its agents, officers and employees, from and against all liability; provided however, that the Consultant's duty to indemnify and hold harmless shall not include the proportionate amount of liability arising from the established negligence or willful misconduct of the City, its agents, officers or employees. This section in no way alters, affects or modifies the Consultant's obligations and duties under Section 4.3.1 herein.

6.2 Indemnification for Professional Services. As to the Consultant's Professional Services related thereto, the Consultant agrees to indemnify, protect and hold harmless the City, its agents, officers and employees from and against any and all liability, including but not limited to, claims asserted or costs, losses or payments for injury to any person or property caused or claimed to be caused by the acts or omissions of the Consultant, or Consultant's employees, agents, and officers, directly or indirectly arising out of obligations, work or services involving the Project; provided however, that the Consultant's duty to indemnify and hold harmless shall not include the proportionate amount of liability arising from the established negligence or willful misconduct of the City, its agents, officers or employees.

6.3 Duty to Defend. The Consultant further agrees that the Indemnification Agreements in Sections 6.1 and 6.2, and the duty to defend the City in Section 6.1, require the Consultant to pay any and all costs the City incurs associated with enforcing these provisions.

Article VII Reserved;

Article VIII: Miscellaneous:

8.1 Headings. All article headings are for convenience only and shall not affect the interpretation of this Agreement.

8.2. Independent Contractors. The Consultant and any Subconsultants employed by the Consultant shall be independent contractors and not agents of the City. Any provisions of this Agreement that may appear to give the City any right to direct the Consultant concerning the details of performing the Professional Services, or to exercise any control over such performance, shall mean only that the Consultant shall follow the direction of the City concerning the end results of the performance.

8.3 Compliance with Controlling Law. The Consultant shall comply with all laws, ordinances, regulations, and policies of the federal, state, and local governments applicable to this Agreement. In addition, the Consultant shall comply immediately with all directives issued by the City or its authorized representatives under authority of any laws, statutes, ordinances, rules, or regulations. The laws of the State of California shall govern and control the terms and conditions of this Agreement.

8.4 Jurisdiction and Venue. The venue for any suit or proceeding concerning this Agreement, the interpretation or application of any of its terms, or any related disputes shall be in the County of San Diego, State of California.

8.5 Control and Administration of Agreement; Notices. Control and administration of this Agreement is under the jurisdiction of the City Manager of the City as to City's interest herein and any communication to the terms or conditions or any changes thereto or any notice or notices provided for by this Agreement or by law to be given or served upon City may be given or served by letter deposited in the United States mail, postage prepaid, and addressed to the City Manager, Attention of Park and Recreation Director, City Administration Building, 202 C Street, San Diego, California 92101.

Any notice or notices provided for by this Agreement or by law to be given or served upon Consultant may be given or served by depositing in the United States mail, postage prepaid, a letter addressed to said Consultant at his principal place of business or any other address which may hereafter be agreed upon by Consultant and City, or may be personally served upon Consultant or any person hereafter authorized by Consultant to receive such notice. Any notice or notices given or served as provided herein shall be effectual and binding for all purposes upon the principals of the parties so served. Service shall be effective either upon personal service of notice or two (2) days after notice is deposited in the United States mail.

8.6 Documents as City Property. All documents required to be delivered to City by the terms of this Agreement shall become City property when Consultant has been compensated as set forth herein, and the City shall thereafter retain sole and exclusive rights to use such documents. This provision shall not apply to any documents which constitute or contain

confidential or privileged communications with persons or entities other than the City.

8.7 Subconsultants. Subconsultants employed by Consultant for the Project shall be subject to prior approval by the City Manager.

8.8 Assignment to Third Party. Consultant shall not assign this contract or any monies due or to become due hereunder without City's prior written consent. Any assignment by Consultant without City's prior written approval shall be cause for termination of this Agreement at the sole option of City. In no event shall any contractual relation be created between any third party and City.

IN WITNESS WHEREOF, this Agreement is executed by the City of San Diego, acting by and through its Park and Recreation Department Director, pursuant to the City Manager's delegation of authority in San Diego Municipal Code section 22.0226 authorizing such execution, and by the Consultant.

Dated this 24 day of September, 1999.

THE CITY OF SAN DIEGO

By _____ [SIGNED]
City Manager

WE HEREBY CERTIFY that we have read all of this Agreement, this 24 day of September, 1999.

By _____ [SIGNED]
Alan Wiener

And

THE MEDIATION INSTITUTE

By _____ [SIGNED]
Alana S. Knaster

I HEREBY APPROVE the form and legality of the foregoing Agreement this 24th day of September, 1999.

CASEY GWINN, City Attorney

By _____ [SIGNED]
Deputy City Attorney

EXHIBIT A

SCOPE OF SERVICES

I. CONSULTANT'S RESPONSIBILITIES

Under the general supervision of the City Manager's designated representatives, Consultant shall provide the City with all of the professional services required for the Mediation Feasibility Assessment and Public Participation Process Project .

II. BASIC SERVICES

- A. Project Description.** Consultants will assess the feasibility of public policy mediation concerning the Zoological Society of San Diego's proposed leasehold expansion and amendments to the Balboa Park Master Plan and the Central Mesa Precise Plan ("the Zoo Proposal"). Public policy mediation is a process in which an impartial person facilitates negotiations between interested government agencies, public and private organizations, and individuals ("stakeholders") to assist them in reaching a consensus regarding issues of public concern. If public mediation of the Zoo Proposal appears feasible, Consultants will design and recommend a process to achieve a consensus among stakeholders. If public mediation does not appear feasible, Consultants will design and recommend another suitable process for public comment and participation concerning the Plan amendments entailed in the Zoo Proposal.
- B. Project Objectives.** The objectives of this Project are:
1. To identify citywide stakeholders which have responsibilities or significant interests related to the Zoo Proposal.
 2. To identify the primary issues of concern to stakeholders.
 3. To determine the stakeholders' willingness to participate in a public mediation process.
 4. To assess the prospects of the stakeholders reaching a consensus through mediation.
 5. To formulate a suitable public mediation process, or another suitable public comment and participation process.
- C. Project Tasks.** The following actions will be taken to achieve the Project Objectives:

- Step 1: Preliminary Meetings with Staff.** Preliminary meetings will be held with City staff to obtain background information concerning the Zoo Proposal and its relation to the current Master Plan and Precise Plan, and to ascertain the identities of stakeholders believed to have responsibilities or significant concerns related to the Zoo Proposal.
- Step 2: Convening Conferences with Key Stakeholders.** Consultants will have personal and/or telephone conferences with representatives of key stakeholders, individually or in groups believed to have similar interests. (A general meeting of stakeholders is not included in this proposal.) The conference objectives will be a) to identify substantive issues of importance related to the Zoo Proposal; b) to determine whether stakeholders are willing to participate in a mediation of the Zoo Proposal; and c) to identify other individuals or organizations which may have significant interests affected by the Zoo Proposal.
- Step 3: Consultations with Staff Concerning Process Design.** Consultants and City staff will discuss the progress of the mediation feasibility assessment and the mediation or other public participation process design throughout the project.
- Step 4: Convening Report.** Consultants to prepare a written Convening Report and 5 copies, summarizing the work performed and assessing the feasibility of resolving issues related to the Zoo Proposal through public mediation. The report will include: a) the identities of the persons and organizations contacted; b) the general nature of issues raised concerning the Zoo Proposal; c) an assessment of whether mediation might resolve significant issues related to the Zoo Proposal; and d) recommendations concerning a process to achieve a consensus among stakeholders, if mediation appears feasible; otherwise recommendations concerning another process for public comment and participation.

D. Schedule. The actions described above will be completed within the following times after acceptance of this proposal:

Step 1:	Preliminary Meetings with Staff	1 week
Step 2:	Convening Conferences with Key Stakeholders	8 weeks
Step 3:	Consultations with Staff Concerning Process Design	9 weeks
Step 4:	Delivery of Convening Report	9 weeks

E. Division of Work by Consultants. The work will be performed by Alana Knaster for The Mediation Institute, and by Alan Wiener, jointly or in consultation with each other. Knaster and Wiener will jointly plan the convening conferences, and will both meet with representatives of the City, the Zoological Society and other key stakeholders. Knaster or Wiener will meet with representatives of other stakeholders,

and will discuss the results of those meetings with one another. Knaster and Wiener will jointly prepare and submit the convening report.

- F. Limitation of Scope.** This proposal will be completed on performance of the actions described above, and does not include the facilitation of the proposed mediation or other public participation proceedings. A separate proposal for Consultants facilitation of those processes will be submitted with the convening report.
- G. Consultants' Neutral Role.** Consultants will serve in a neutral and impartial capacity, to facilitate a consensus on terms acceptable to all stakeholders, and not as the representative or advocate for any interested party. The parties acknowledge that Alan Wiener is a licensed attorney, but is not acting in that capacity, and will not provide legal advice or representation to any party in performing the services pursuant to this proposal.
- H. Confidentiality.** All communications in the course of mediation, including the convening assessment process, are confidential under California law, and maintaining confidentiality is essential to the mediation process. Consultants therefore will not be requested or required to reveal communications made in confidence by parties or potential parties to the mediation without written consent of the participants.
- I. Ethical Standards.** Consultants will observe the Model Standards of Practice for Consultants which were jointly adopted by the American Bar Association, the Society of Professionals in Dispute Resolution and the American Arbitration Association.

EXHIBIT B

COMPENSATION AND FEE SCHEDULE

I. CONSULTANT'S COMPENSATION

The City shall compensate the Consultant, for Professional Services provided to the City on the Mediation Feasibility Assessment and Public Participation Process Design Project, in accordance with the terms and conditions of this Agreement, as follows:

- A. Basic Services.** For the Consultant's basic services as set forth in Exhibit A, a lump sum fee of Ten Thousand Dollars (\$10,000.00).
- B. Reimbursable Expenses and Additional Services.** For the Consultant's reimbursable expenses or additional services, if required, a maximum fee of four thousand dollars (\$4,000.00) will be paid. Reimbursable expenses include providing documents, reports, photographic and photocopying processes, mailing, delivery and shipping, etc., requested by the City which are not included in the

Consultant's scope of services. Additional services are additional professional services requested by the City which are beyond the Scope of Services.

II COMPENSATION SCHEDULE

A. Basic Services Invoices. Invoices for basic services shall be sent to the assigned Project Manager. Payments to Consultant for basic services shall be made monthly in proportion to work accomplished by Consultant and shall not exceed the following:

1. Within thirty days following acceptance of this agreement \$5,000.00
2. Within fifteen days following delivery of the Convening Report \$5,000.00

B. Reimbursable Expenses and Additional Services Invoices. Invoices for reimbursable expenses and additional services as outlined in I.B. shall be made monthly as they are incurred.

III. FEE SCHEDULE

<u>Job Title</u>	<u>Billing Rate per Hour</u>
Mediator/Facilitator	\$175.00
Clerical	\$ 45.00

IV. FACILITIES AND EQUIPMENT

The City will provide suitable facilities and equipment for Consultants' convening conferences.